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No. 03-339

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

José Francisco Sosa,

Petitioner

v.

Humberto Alvarez-Machain, *et. al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CORPORATE SOCIAL RESPONSIBILITY AMICI IN SUPPORT OF RESPONDENT

TERRENCE P. COLLINGSWORTH
(*Counsel of Record*)
NATACHA THYS
INTERNATIONAL LABOR RIGHTS FUND
733 15TH Street N.W., Suite 920
Washington, D.C. 20005
(202) 347-4100

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

The Alien Tort Statute (ATS), 28 U.S.C. 1350, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The questions presented are:

1. Whether the ATS creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the Untied States or, instead, is a jurisdiction-granting provision that does not establish private rights of action.

2. Whether, to the extent that the ATS is not merely jurisdictional in nature, the challenged arrest in this case is actionable under the ATS.

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Amici curiae the International Labor Rights Fund, the International Center for Corporate Accountability, Verité, Domini Social Investments, KLD Research & Analytics, Inc., Harrington Investments, Inc., Interfaith Center on Corporate Responsibility, Centre for Research on Multinational Corporations, the Commission for the Verification of Codes of Conduct, OECD Watch, Oxfam America, Rugmark Foundation, TransAfrica Forum, Jubilee South Africa, and the Development Gap, collectively referred to herein as the Corporate Social Responsibility *Amici* ("CSR *Amici*"), respectfully submit this brief in support of Respondents.[1]

INTEREST OF THE *AMICI CURIAE*

The CSR *Amici* work to develop, implement or support mechanisms to improve corporate compliance with human rights standards in the global economy. Most of these initiatives are voluntary and require that participating companies agree to be bound by a specific, substantive standard, whether it is a code of conduct or an external source of law. The CSR *Amici* have found that the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, is a vital tool in establishing minimum standards of conduct for participants in the global economy. The CSR *Amici* also have an interest in responding to assertions made in various *amici* submissions in support of Petitioner, most notably in the Brief for the National Foreign Trade Council, *et. al.*, that the ATCA is a hindrance to foreign investment. A major premise of the work of the CSR *Amici* is that socially responsible companies are rewarded in the marketplace. Thus, the CSR

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[1] Letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary payment towards this brief.

Amici respectfully seek leave to file this *amici curiae* brief to assist the Court.

The International Labor Rights Fund (ILRF) is a non-profit organization that promotes corporate social responsibility through advocating for human rights standards in trade agreements, developing systems to enforce corporate codes of conduct, and utilizing the ATCA and other sources of law to represent workers who have been subject to human rights violations. ILRF was formed in 1986 by a coalition of labor leaders, human rights activists, academics and religious leaders.

The International Center for Corporate Accountability (ICCA) is a non-profit organization, whose mission is to urge multinational corporations to create voluntary standards that guide their conduct in overseas operations on issues such as working conditions, protection of human rights, and sustainable development. ICCA also creates systematic procedures by which it provides independent external monitoring to verify compliance with company codes of conduct.

Verité is a non-profit organization established in 1995 to ensure that people worldwide work under safe, fair and legal conditions. Verité conducts social audits, factory remediation, issue research, capacity building and worker education in 65 countries worldwide. Verité works at the grassroots level through a global network of local organizations.

Domini Social Investments (DSI) is an investment firm specializing exclusively in socially responsible investing. DSI manages over $1.8 billion in assets for investors who wish to integrate social and environmental criteria into their investment decisions. It also manages the Domini Social Equity Fund, the oldest and largest socially and environmentally screened index

fund in the world, as well as the Domini Social Bond Fund and the Domini Money Market Account.

KLD Research & Analytics, Inc. (KLD) is the leading provider of social research for institutional investors. KLD serves institutional clients who wish to integrate social criteria into their investment decisions. To meet the needs of social investors, KLD provides performance benchmarks, corporate accountability research, and consulting services analogous to those provided by financial research service firms.

Harrington Investments, Inc. (HII) is a registered investment advisor managing assets for investors concerned about social, as well as financial, returns. Its mission is to provide highly personalized asset management services that reflect a commitment to superior financial results consistent with positive environmental, ethical, and social change. This is accomplished by investing to achieve maximum economic and social goals using comprehensive social screening.

The Interfaith Center on Corporate Responsibility (ICCR), with its 275 members from Catholic, Jewish and Protestant religious communities, promotes corporate responsibility through its members' role as shareholders. ICCR, founded in 1971, has filed shareholder resolutions and has participated in dialogues with numerous corporations on a range of human rights, labor rights and environmental issues. ICCR members promote the development and independent monitoring of comprehensive corporate codes of conduct based on internationally-recognized human rights standards.

Centre for Research on Multinational Corporations (SOMO) is a Netherlands-based organization founded in 1973 that conducts research for non-governmental organizations and trade

unions on the behavior of transnational corporations, the trade and investment agreements in which they operate, and the implementation of codes of conduct.

The Commission for the Verification of Codes of Conduct (COVERCO) is a Guatemalan non-profit organization dedicated to providing accurate and credible information on workplace compliance with labor standards in Guatemala's major export industries for prominent U.S. companies, including The Gap, Starbucks, and Liz Claiborne.

The Organization for Economic Cooperation in Development Watch (OECD Watch) is an international network that facilitates activities around the OECD Guidelines and the work of the Committee on International Investment and Multinational Enterprises. One of its main purposes is to assist organizations that wish to bring complaints against multinational corporations for violations of human rights.

Oxfam America works to find lasting solutions to poverty, suffering and injustice. Oxfam America's campaign and communications work is aimed at mobilizing public opinion to change the rules of international trade and the policy and practices of multinational companies.

Rugmark Foundation is dedicated to ending illegal child labor in the carpet industry through a voluntary licensing program in which participating companies agree to random, surprise inspections of manufacturing sites to ensure that no child labor is used. Companies in Europe and the United States participate in Rugmark's independent monitoring program.

TransAfrica Forum is a non-profit organization dedicated to educating the general public, particularly African Americans,

on the economic, political and moral ramifications of U.S. foreign policy as it affects the African Diaspora. TransAfrica Forum sponsors seminars, conferences, community awareness projects, and training programs that promote U.S. policies that are supportive of human rights, democracy, and sustainable economic development.

Jubilee South Africa is a network of non-governmental membership based organizations concerned with global corporate social responsibility.

The Development Group for Alternative Policies (The Development GAP) is a non-governmental organization that collaborates with civil-society organizations to advance the right of citizens to participate fully in economic decision-making that affects their communities. The organization works to ensure that trade and investment agreements strike a balance between the interests of citizens and corporations.

SUMMARY OF ARGUMENT

Respondents, and several of the other *amicus curiae* briefs filed in support of Respondents, demonstrate that the interpretation of the ATCA in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and by every court that has considered the issue since then, up to and including the Ninth Circuit's *en banc* decision being reviewed in this case, is correct as a matter of law. This brief will address the argument made by several of the *amici* submissions in support of Petitioner that the ATCA is a hindrance to foreign investment by U.S. multinationals. This position is most directly advanced in the Brief for the National Foreign Trade Council, *et. al.* (hereinafter "NFTC Brief"), in which the various business organizations (hereinafter "Business *Amici*") assert that the mere existence of a right to sue for

fundamental human rights violations established by the ATCA poses a threat to their economic well-being.

As an initial matter, the economic impact issue raised by the Business *Amici* is not in the record of this case. Several pending cases in the lower courts may some day present an appropriate record for this Court to consider the economic impact of the ATCA, if indeed such an argument would ever have any legal relevance. Nonetheless, if the arguments made by the Business *Amici* in the NFTC Brief are given any consideration, the CSR *Amici* will demonstrate herein that the ATCA, as interpreted today, is simply one source in a body of law that includes the Nuremberg Tribunals, and various other federal laws, that place clear, universally recognized limits on the conduct of corporations and individuals. For the Business *Amici* to target the ATCA as the barrier to greater profits ignores substantial precedent demonstrating that the U.S. has been a leader in applying the rule of law to human rights violations. There is simply no legal basis for the Business *Amici* to assert that their desire for further profit overrides the ATCA, which applies to prevent slavery, torture, extrajudicial killing, genocide, war crimes, crimes against humanity, and arbitrary detention.[2]

The CSR *Amici* will also demonstrate that the ATCA's very limited scope poses absolutely no threat to foreign investment by U.S. companies. Virtually all of the firms represented by the Business *Amici* participate in some form of a corporate social responsibility initiative and pledge to comply with social standards that far exceed the minimum standards of

[2] *See* section III, *infra*, for a discussion of cases that demonstrate this narrow scope of the federal courts' interpretation of the "law of nations" for purposes of the ATCA.

fundamental human rights under by the ATCA. Unless these companies are misrepresenting their compliance with these standards, their assertion that the ATCA is a hindrance to their economic competitiveness is simply incredible.

ARGUMENT

I. THE ECONOMIC IMPACT ON MULTINATIONAL CORPORATIONS OF HUMAN RIGHTS STANDARDS UNDER THE ATCA IS NOT BEFORE THE COURT.

The Business *Amici* are asking this Court to consider their argument that the ATCA puts them at a competitive disadvantage in the global economy. *See, e.g.*, NFTC Brief at 10-13. The record in this case does not include any competitive disadvantage or other economic impact issues on multinational corporations, making this case an inappropriate vehicle for considering this argument. A fundamental principle of Supreme Court practice is that the Court will not consider issues that are not squarely before it. For example, in *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 314 (1893), this Court held however convenient it is to decide the question, "the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." The Court reinforced this holding in *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), stating "it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it." *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157- 158, n.16 (1970).

The need to adhere to the rule limiting review to matters properly in the record is well illustrated by the effort of the

Business *Amici* to rely upon a letter filed by the U.S. State Department's Legal Advisor, William H. Taft in another case, *John Doe I v. Exxon Mobil Corp.*, No. 01-Civ-1357 (D.D.C. June 19, 2001). *See* NFTC Brief at 12, n. 19. In response to the assertions made in the Taft letter, plaintiffs in the *ExxonMobil* case submitted hundreds of pages of evidence, including affidavits from prominent experts on foreign relations, business practices, and terrorism. In order to properly assess any of these issues as they relate to the arguments advanced by the Business *Amici*, all of that evidence would need to be in the record of this case. There are several pending cases, including *John Doe I v. Exxon Mobil,* that may someday provide this Court an opportunity to assess whether claims of economic impact under the ATCA have any legal relevance. The case currently under consideration simply does not involve any of the issues raised by the Business *Amici*.

II. THE U.S. IS A LEADER IN PROMOTING THE RULE OF LAW AND, SINCE NUREMBERG, HAS REJECTED THAT COMPETITIVE ADVANTAGE CAN JUSTIFY VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS.

Virtually every society that respects the rule of law has developed laws that restrain the profit motive. Under U.S. law, for example, companies (and individuals), no matter how profitable it might be, are prohibited from using slaves or engaging in slavery-like practices. *See, e.g.*, U.S. Const. Amend. XIII; Peonage, Slavery & Trafficking in Persons, 18 U.S.C. §1584; *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 383 (E.D.N.Y. 2002) (holding the thirteenth amendment and its enabling statute, 18 U.S.C. §1584, apply to private conduct). Likewise, no company may torture its workers. *See* Torture Victims Protection Act (TVPA), 28 U.S.C. §1350, *note* (1992). To assert otherwise would seem absurd and barbaric. Even free

market economists who otherwise abhor regulation of business activities accept that restraints in law on harmful conduct are required to deter such conduct. Indeed, the rule of law is a necessary component of any free market economy geared towards profit. *See, e.g.*, Thomas Carothers, *The Rule of Law Revival*, Foreign Aff., at 95 (Mar. - Apr. 1998)(noting that the basic elements of a modern market economy, such as property rights and contracts, are founded on the law).

The ATCA has played a unique role in maintaining U.S. leadership with respect to the rule of law and protecting universally recognized human rights. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM J. INT'L L. 461, 493 (1989). *See also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2397-98 (1991) (noting that the very existence of ATCA jurisdiction has a deterrent effect on potential violators of human rights).

Undeterred by the legal or moral implications of their argument, the Business *Amici* assert that "[ATCA] lawsuits harm the economy by putting companies with a U.S. presence at a unique and unfair competitive disadvantage." NFTC Brief at 10. As there is no question that the conduct of these companies is proscribed by law within the U.S., the essence of the business opposition to the ATCA is that U.S. companies might face liability for their *international* operations. This, they assert, would place U.S. companies at a "competitive disadvantage" with non-U.S. companies, not reachable by the ATCA, which would then presumably remain free to engage in violations of fundamental human rights. *See id.* at 12.

It is difficult to respond on the merits to an "others do it too" argument that would not even get a serious hearing in a

playground dispute. As an initial matter, however, it is simply untrue that the other nations of the world do not have legal procedures for addressing human rights violations. The courts of many European countries have asserted jurisdiction over cases alleging violations of human rights occurring internationally. For example, requests for extradition were issued by the courts of Spain, Belgium and Switzerland for General Augusto Pinochet based on his involvement in gross violations of human rights in Chile. *See* Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches To Past Abuses*, 19 AM U. INT'L. L. REV. 301 (2003). In the corporate context, cases concerning the use of forced labor in Burma were filed against Totalfina Elf in 2002. The first, filed in Belgium, cited "complicity in crimes against humanity." The second, filed in France, cited "complicity in unlawful confinement."[3] *See also* Schalk Willem Burger Lubbe and Cape PLC, House of Lords, Judgment (20 July 2000)(authorizing South African asbestos victims to proceed in UK courts against British asbestos maker Cape PLC).[4]

More fundamentally, the Business *Amici* fail to acknowledge that the U.S. has been a leader, since the Nuremberg Tribunals, in treating fundamental human rights norms as binding and enforceable through the rule of law, regardless of whether other nations permit barbaric behavior. Following Nuremberg, in addition to recent interpretations of the ATCA, there have been numerous laws passed by Congress

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[3] *See, e.g., Total Faces Burmese Forced-Labour Charges*, Financial Times, Aug. 30, 2002 and *Totalfinaelf accused of Forced Labour*, Financial Times, Oct. 23, 2002 (abstracted from Les Echos, Global News Wire).

[4] *Available at* http://www.parliment.the-stationery-office.co.uk.

that act to restrain conduct, by corporations and individuals, that while profitable, are in violation of fundamental societal norms. Key examples are the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78 *et. seq.* (1977), and the TVPA, 28 U.S.C. § 1350, *note*. These laws may arguably place U.S. companies at a competitive disadvantage vis-a-vis non U.S. companies, but Congress has determined that certain egregious conduct simply cannot be the basis for profitability. Turning back the clock on these historic events based on an unproven allegation of "competitive disadvantage" would do more than nullify the ATCA.

A. The Nuremberg Tribunals Established that No Civilized Society Permits a Company to Profit from Slavery and Other Fundamental Human Rights Violations.

At Nuremberg, the Allies, led by Justice Robert H. Jackson, inspired the world by bringing Nazi war criminals, including companies that aided and abetted the Nazis, to justice in a court of law. Justice Jackson "had a passionate conviction of the need to transform international law from a mere collection of hopes into an effective binding set of rules to govern the behavior of nations. He believed that international law was the only means for realizing man's wish for peace." *See* Ann Tusa and John Tusa, The Nuremberg Trial, 68 (Cooper Square Press, 2003 ed.).

In one of the key Nuremberg cases, *United States v. Friedrich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952) (hereinafter "TWC"), the Tribunal found Flick, the owner of a freight car business guilty of slavery and crimes against humanity based on his knowledge and approval of his company's decision to increase its production quota knowing

forced labor would be required to meet the increase. The Tribunal held Flick legally responsible for profiting from the Nazi slave labor program although he did not "exert any influence or [take] any part in the formation, administration or furtherance of the slave-labor program." TWC at 1198. The critical basis for liability was Flick's approval of the decision to increase company revenues knowing that such a decision would result in the use of forced labor. *Id.* at 831.

Similarly, in *United States v. Karl Krauch*, 8 TWC (1952), the Tribunal found Krauch guilty although, as in the *Flick* case, he did not create the slave labor program or control the allotment process. Krauch simply made an affirmative decision to conduct business knowing that it would result in the use of forced labor. For this the Tribunal found him guilty, stating, "Krauch was neither a moving party or an important participant in the initial enslavement of workers . . . [but] in view of what he clearly must have known about the procurement of forced labor and the part he voluntarily played in its distribution and allocation, his activities . . . impel us to hold that he was a willing participant in the crime of enslavement." *Id.* at 1189.

Demonstrating the extreme de-evolution in law sought by the Business *Amici*, the NFTC Brief and others argue that U.S. businesses operating in the global economy should not even have to answer in court to charges that a company knowingly aided and abetted a government that uses slave labor. *See* NFTC Brief at 11. Obviously sensitive to the image of U.S. businesses rallying to repudiate the Nuremberg Tribunals, the Business *Amici* instead attack as improper the Ninth Circuit's citation in the *Unocal* case to the *ad hoc* international criminal

tribunals established for the former Yugoslavia and Rwanda.[5] *Id.* However, these subsequent tribunals explicitly relied upon the historic rulings at Nuremberg in making their findings of liability. For example, in *Prosecutor v. Dusko Tadic*, ICTY-94-1 (May 7, 1997)[6] the Yugoslavia Tribunal noted that "[t]he most relevant sources ... are the [Nuremberg] war crimes trials, which resulted in several convictions for complicitous conduct." *Id.* at ¶ 674.

Nuremberg was not an aberration – it was a demonstration to the world of using the rule of law as an alternative to violence, a lesson especially applicable at the present time. The United Nations specifically ratified the Nuremberg Tribunals as a major step forward in elevating universal human rights norms to the status of law.[7] The position of the Business *Amici* that they are at a competitive disadvantage due to the ATCA's constraints prohibiting slavery and other fundamental human rights violations would open the door to an alarming return to barbaric behavior. As the next two sections demonstrate, Congress has acted in recent times to reinforce that "competitive disadvantage" cannot outweigh the fundamental

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[5] *John Doe I v. Unocal Corp.*, 2002 WL 31063976 * 9-10 (9th Cir. 2002)(emphasis added), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. Feb 14, 2003), *submission withdrawn pending decision in this case*. Subsequent federal cases have relied upon these tribunals in ATCA cases. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 323 (S.D.N.Y. 2003).

[6] *Available at* http://www.un.org.icty/tadic/trialc2/judgment/index.htm

[7] *See, e.g., Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal*, G.A. Res. 95(1), U.N. GAOR, 1st Sess., Part II at 188, U.N. Doc. A/64/Add.1 (1946).

values of our society.

B. The Foreign Corrupt Practices Act Was Passed Despite Express Concerns by U.S. Business That They Would Be Placed at a Competitive Disadvantage.

The idea that corporations should be free to obtain the greatest competitive advantage in the marketplace, without regard to the social or moral costs of their conduct, was rejected by Congress in the context of addressing corruption. In 1977, Congress passed the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-2, 78ff, to criminalize, *inter alia*, the bribery of any "foreign official" by "any domestic concern" in order to "obtain or retain business." Additionally, the FCPA introduced new reporting and disclosure requirements to increase the transparency of international business transactions. The legislation was necessary to repair America's tarnished image and increase confidence in the integrity of U.S. corporations in the late 1970s. Indeed, as the legislative history of the FCPA reveals, the law was introduced after Securities and Exchange Commission investigations revealed "corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars." S. Rep. No. 95-114, 1977 WL 16144 at *3-4 (May 2, 1977). The rationale for passing the anti-corruption legislation was that:

> Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality and service. Corporate bribery is fundamentally destructive of this basic tenet. . . Thus foreign corporate bribery affects the very stability of overseas business. *Id.* at *4.

The law was passed despite an outcry from U.S. businesses claiming that the FCPA put them at a competitive disadvantage with respect to their European counterparts. These concerns were cited time and again in the House and Senate debates leading up to the ratification of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention"). *See, e.g.* 144 Cong. Rec. S4220-01, 1998 WL 215554 (May 4, 1998)(noting "United States corporations have contended that this [the FCPA] has put them at a significant disadvantage in competing for international contracts with respect to foreign competitors who are not subject to such laws").

Thus, in the face of this alleged competitive disadvantage, the U.S. Congress chose to aggressively promote anti-corruption measures internationally, rather than relax such standards at home. Indeed, Congress explicitly encouraged the negotiation of an anti-corruption agreement within the Organization for Economic Cooperation and Development ("OECD") during the Reagan Administration in the Omnibus Trade and Competitiveness Act of 1988. As of 2003, 34 nations ratified the Convention, which requires the signatories to enact domestic legislation to combat foreign bribery.[8] Later, the U.S. Senate ratified the Inter-American Convention Against Corruption on July 27, 2000, which binds the governments of the Western Hemisphere to combat corrupt practices in international business.[9]

The experience with the FCPA amply demonstrates that the solution to perceived or actual disadvantage in business

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[8] *See* http://www.oecd.org/dataoecd/59/13/1898632.pdf.

[9] *See* http://www.oas.org/juridico/english/Treaties/b-58.html.

relations is not to find the lowest common denominator, as suggested by the Business *Amici*, but to promote respect for those principles among other nations internationally. The combined power of the Business *Amici* and the U.S. government would have been better spent drafting a multilateral mechanism to ensure global compliance with human rights standards than seeking to eradicate the ATCA.

C. The Torture Victims Protection Act Likewise Applies to Prohibit Torture and Extrajudicial Killing Regardless of Economic Impact.

Congress passed the TVPA, 28 U.S.C. § 1350, *note*, to prohibit torture and extrajudicial killing. *See* S. Rep. No. 102-249, 1991 WL 258662, *3 (Nov. 26, 1991). While Respondents, and several other *amici* in support of Respondents, address in detail the significance of the passage of the TVPA in confirming the ongoing validity of the ATCA, the passage of the TVPA also resoundingly confirms that extreme human rights violations, such as torture and extrajudicial killing, are universally condemned and prohibited by U.S. law, even if there is an impact on the way U.S. companies do business.

It is significant to note that in attacking the ATCA, the Business *Amici* cite the TVPA as an example of a clear, if not model, statutory scheme to regulate international violations of human rights. *See, e.g.*, NFTC Brief at 27-28. However, the Business *Amici* fail to disclose that individual companies when sued under the TVPA have argued specifically that the TVPA does not apply to corporations. *See, e.g., Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003) (rejecting defendants' argument that the TVPA by its plain language applies only to "individual" defendants, not

corporate entities); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003)(also rejecting defendants' argument that they, as corporations, should not be liable to suit under the TVPA). Likewise, in its pending motion to dismiss, Exxon Mobil Corporation argued that it is not subject to the TVPA as a corporate entity. *See John Doe I v. Exxon Mobil Corp.*, No. 01-1357 (D.D.C. filed June 19, 2001), Defendants' Motion to Dismiss at 22 (filed on October 1, 2001). While this reveals that the Business *Amici* have an underlying agenda to be free from all binding human rights regulation, the reality is that the TVPA does apply to individuals and corporations, and it prohibits torture and extrajudicial killing regardless of whether there is an economic impact.

III. THE ATCA, AS INTERPRETED AND APPLIED BY THE FEDERAL COURTS, ESTABLISHES A CLEAR STANDARD OF PROHIBITED CONDUCT.

The Business *Amici* argue that their alleged competitive disadvantage from being bound to fundamental human rights standards under the ATCA is magnified by "enormous uncertainty regarding the scope of potential claims under the statute." NFTC Brief at 10-11. This argument is disingenuous on two fundamental levels. First, following *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the law has been remarkably consistent in defining the scope and source of the "law of nations" for purposes of the ATCA. Second, knowing that the law is clear, the Business *Amici* resort to using ***allegations*** made in various ATCA cases as the basis for demonstrating the lack of certainty. The Business *Amici* fail to disclose that the parade of allegations they use are from cases in which the claims were dismissed precisely because they were not within the scope of the ATCA's "law of nations." This not only demonstrates a lack of candor with the Court, but also

reinforces that the objective of the Business *Amici* is not clarification of the ATCA standard, but nullification of the ATCA and immunity from the law.

A major issue addressed by the Respondents, as well as other *amici*, is the scope and source of the "law of nations" for purposes of defining actionable torts under the ATCA. In responding to the Business *Amici's* competitive disadvantage argument, however, it is also necessary to briefly address this issue. Based on actual decisions made by courts, as opposed to allegations that have been or could be made, the list of actionable torts under the ATCA is short and precise:genocide,[10] war crimes,[11] extrajudicial killing,[12] slavery,[13] torture,[14] arbitrary detention,[15] and crimes against

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[10] *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1996)(violent acts with the intent to destroy religious and ethnic groups constitute genocide); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289 (S.D.N.Y. 2003) (campaign of ethnic cleansing directed against non-Muslim population of Sudan constituted genocide under the ATCA).

[11] *See, e.g., Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (also recognizing systemic rape as a tool of war).

[12] *See, e.g., Kadic*, 70 F.3d at 240–41, 243–44 (noting that when Congress passed the TVPA, it codified the ATCA's application to extrajudicial killing and torture); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (finding jurisdiction under the ATCA and TVPA for the extrajudicial killing of plaintiff in Chile by a member of the Chilean military).

[13] *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1307–08 (C.D. Cal. 2000) *(citing Kadic*, 70 F.3d at 234); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794 (D.C. Cir. 1984)(Edwards, J., concurring), *cert.*

humanity.[16] Indeed, the restatement on foreign relations adopts this list of the "international law of human rights," adding only "systematic racial discrimination" to the finite list consistently cited by federal courts in ATCA cases.[17] RESTATEMENT (THIRD)

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denied, 470 U.S. 1003 (1985); *NCGUB v. Unocal Inc.*, 176 F.R.D. 329, 348 (C.D. Cal. 1997); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.N.J. 1999).

[14] *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 847–48 (11th Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995). The TVPA specifically defines "torture" to include "mental pain or suffering" resulting from "the threat of imminent death." 28 U.S.C. § 1350, Historical and Statutory Notes § 3(b)(1)–(2)(C) (1993). The definition of "torture" under the TVPA is the same as under the Torture Convention. *See* S. REP. NO. 102–249, 1991 WL 258662, at *6. The related concept of "cruel, inhuman, or degrading treatment" has also been recognized. *See Cabello*, 157 F. Supp. 2d at 1361.

[15] *See, e.g., Abebe-Jira*, 72 F.3d at 844; *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). A related concept is "disappearance,"which has been defined as "abduction by state officials or their agents," followed by "official refusals to acknowledge the abduction or to disclose the detainee's fate." *See Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1988).

[16] *See, e.g., Kadic*, 70 F.3d at 240–44; *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, *9 (S.D.N.Y. 2002) (defining crimes against humanity as, inter alia, "torture . . . [and] inhumane acts . . . intentionally causing great suffering or serious injury to body or mental or physical health").

[17] In one case, three Colombian trade union leaders who were murdered in the course of negotiations with their employer over a dispute regarding their collective agreement were found to have stated claims for extrajudicial killing under the ATCA. *See Estate of Rodriquez*, 256 F. Supp. 2d at 1267. In addition, the court held that Plaintiffs had also

FOREIGN RELATIONS LAW § 702 (1987). The limited scope of the ATCA is due largely to the rigorous standard adopted by the Second Circuit in *Filartiga*. The court held that an ATCA claimant must demonstrate a violation of "'a settled rule of international law'" recognized by "'the general assent of civilized nations.'" *Filartiga*, 630 F.2d at 881(*quoting, The Paquete Habana*, 175 U.S. 677, 694 (1900)).

Anticipating the exact argument now made by the Business *Amici*, the Second Circuit stated that "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one." *Id.* at 886. The court rejected the notion that it or any other court had the ability to simply pick and choose laws from an international menu. The court interpreted the ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Id.* at 887.

Post-*Filartiga*, courts applying the ATCA have continued the tradition of a rigorous and restrained approach, and limit the ATCA's reach to "'well-established, universally recognized norms of international law.'" *Kadic*, 70 F.3d at 239 (*quoting Filartiga*, 630 F.2d at 888). *See also In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467,1475 (9th Cir. 1994).

That Courts across the country respect the very limited

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stated a claim for violation of the right to associate. *Id.* at 1262-63. The ruling makes clear, however, that the violation was dependant upon the violent repression of the right to associate. *See id.* Another federal district court refused to recognize a fundamental right to associate under any circumstance. *See Aldana v. Fresh Del Monte Produce, Inc.*, 2003 WL 23205157, *9-10 (S.D. Fla. 2003).

scope of the ATCA is demonstrated convincingly by the types of claims that have been dismissed. In fact, most of the cases cited by the Business *Amici* resulted in the claims being dismissed for being beyond the narrow confines of universally recognized norms. For example, the Business *Amici* assert with derision that "residents of Peru" sued for "violations of their 'right to life,' 'right to health,' and right to sustainable development.'" Further, the plaintiffs alleged that significant health impacts on children living near the mining operations in Peru violated "'the right of the child to the enjoyment of the highest attainable standard of health.'" NFTC Brief at 6. While the Business *Amici* describe this assertion of claims as a symptom of all that is wrong with the ATCA, *see* NFTC Brief at 5-8, the undisclosed truth is that the claims at issue were dismissed by the district court and the dismissal was affirmed by the Second Circuit. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003). Likewise, the claims described in the NFTC Brief at 7 for environmental torts and cultural genocide in the *Beanal* case were dismissed by the district court, and the Fifth Circuit affirmed the dismissal. *Beanal v. Freeport-McMoran, Inc.*, 197 F. 3d 161, 167-68 (5th Cir. 1999).

The Business *Amici* present a litany of various unratified treaties and conventions dealing with issues such as economic and cultural rights, and the rights of children, that have been asserted in ATCA cases, but buried in footnotes are the references to the only two reported cases in which these assertions were made – *Flores* and *Beanal* – both of which were dismissed with prejudice. *See* NFTC Brief at 8-9, ns. 8-11. In short, the best case the Business *Amici* could make with their abundant legal resources that the ATCA has run amuck was that some plaintiffs have made ATCA claims that were promptly

dismissed by the courts. The system is working fine.[18]

As demonstrated above, based on more than 20 years of recent applications, the ATCA applies to genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, and crimes against humanity. To expand this list requires the heavy burden of showing new universal consensus. Responsible business leaders can be certain that if their companies are knowingly engaged[19] in any of these prohibited torts, they may be sued under the ATCA. No party can be liable for an inadvertent violation, and in this era when companies are boasting comprehensive social responsibility programs,[20] it is

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[18] That it is possible to file baseless claims under the ATCA is not an argument for curtailing the use of the ATCA. This problem is common to litigation in general, and the federal courts have specific mechanisms to curb such abuse. *See, e.g.*, Fed. R. Civ. P. 11(b)(2) (requiring attorneys to certify that the claims filed are "warranted by existing law or by a nonfrivolous argument").

[19] There is no question that in order to face ATCA liability, a party must either be the direct perpetrator of the actionable conduct or knowingly aid and abet the direct perpetrator. The sole appellate court to reach this issue in the corporate context was the Court of Appeals for the Ninth Circuit in Unocal. There the court reinforced that even an aiding and abetting situation requires ***knowing*** practical assistance or encouragement that has a substantial effect on the perpetration of the crime." *John Doe I v. Unocal Corp.*, 2002 WL 31063976, * 9-10 (9th Cir. 2002)(emphasis added), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. Feb. 14, 2003), *submission withdrawn pending decision in this case*.

[20] *See* section IV, *infra*, for a discussion of various corporate accountability programs that require companies to actively assess compliance with a wide range of human rights and labor standards.

reasonable to assume that these companies are at least able to state with certainty that no part of their business is associated with any of the heinous crimes actionable under the ATCA.

IV. CORPORATE MEMBERS OF THE BUSINESS *AMICI* CLAIM TO ACCEPT STANDARDS OF VARIOUS CORPORATE SOCIAL RESPONSIBILITY PROGRAMS THAT FAR EXCEED THE FUNDAMENTAL HUMAN RIGHTS NORMS COVERED BY THE ATCA.

Most of the country's largest corporations claim to not only support human rights, but to be bound by various corporate social responsibility programs that set standards much higher than the extreme human rights violations covered by the ATCA. However, these same companies are before this Court, camouflaged by their membership in the various Business *Amici* that filed the NFTC Brief,[21] arguing that they will suffer a competitive disadvantage if the Court affirms the ATCA's application to crimes such as slavery and torture. There are many terms to describe this posturing, but for purposes of this case, the key conclusion is that these companies have utterly failed to demonstrate that they cannot compete in the world

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[21] These groups include: the National Foreign Trade Council (http://www.nftc.org); USA Engage (http://www.usaengage.org/about_us/members/index.html); the American Petroleum Institute (http://api-ec.api.org/links/); US Council for International Business (http://www.uscib.org/index.asp?documentID=1846); US-ASEAN Business Council (http://www.us-asean.org/Aboutus/board_of_directors.asp); and the Business Roundtable (http://www.Businessroundtable.org/pdf/members.pdf). These websites provide the membership lists for these organizations, including memberships held by Exxon Mobil, Unocal Corporation, and Coca-Cola, which are specifically discussed herein.

constrained by the ATCA. If we take them at their public word, these companies are competing in the world while honoring the highest possible human rights standards. A few examples below will highlight what leading members of the Business *Amici* say they are doing to comply with human rights standards, which far exceed those covered by the ATCA.

A. Exxon Mobil Corporation

Depending on how it is measured, Exxon Mobil is either the first or second largest company in the world, and is certainly the largest oil company in the world.[22] Exxon Mobil is a leading member of several of the Business *Amici* that filed the NFTC Brief, including the National Foreign Trade Council, USA Engage, the American Petroleum Institute, US Council for International Business, US-ASEAN Business Council, and the Business Roundtable.[23] Thus, Exxon Mobil is firmly behind the positions taken in the NFTC Brief, including the argument that the ATCA places U.S. companies at competitive disadvantage.

Nevertheless, to its shareholders and the public at large, Exxon Mobil asserts that compliance with human rights standards is a high priority for the company. Indeed, Exxon Mobil states that it plays an active role in using its influence to instill respect for the rule of law: "In nations that lack well-developed legal and commercial systems, we seek ways to establish and strengthen appropriate institutions and norms. We emphasize the necessity of honoring agreements and the primacy of the law in resolving disagreements. We believe this

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[22] BBC News, *Exxon Profits Soar on Higher Price,* July 31, 2003, *at* http://news.bbc.co.uk/1/hi/business/3114153.stm.

[23] *See* note 21, *supra.*

is an often-overlooked positive impact that business can have on the social fabric of a country."[24] On the specific issue of human rights, Exxon Mobil asserts:

> We strongly believe that corporations have an important role to play in promoting respect for human rights. . .
>
> ExxonMobil condemns human rights abuses. We make it clear to all of our employees and contractors - as well as police and military forces that provide security to our operations - that human rights violations will not be tolerated.[25]

Further, ExxonMobil is a member of the *Voluntary Principles on Security and Human Rights*, which is a program initiated by the governments of the United States and the United Kingdom to work with companies in the mineral extractive sectors to develop principles to improve respect for human rights, particularly in addressing security issues.[26] The participants pledge "that we share the common goal of promoting respect for human rights, particularly those set forth in the Universal Declaration of Human Rights, and international

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[24] Exxon Mobil's Corporate Citizenship Report, http://www.exxonmobil.com/corporate/files/corporate/CCR2002_commitment.pdf at 28.

[25] *Id.*

[26] The U.S. government participates in this initiative through the U.S. Department of State. Details of the program are available at http://www.state.gov/g/drl/rls/2931.htm (last visited Feb. 25, 2004).

humanitarian law."[27]

B. Unocal Corporation

Unocal is also a leading member of most of the Business *Amici* that filed the NFTC Brief, including the National Foreign Trade Council, USA Engage, the US Council for International Business, the American Petroleum Institute, and the US-ASEAN Business Council.[28] Its shareholders and the public would no doubt be surprised that Unocal ascribes to the arguments made in the NFTC Brief given the company's public commitment to company compliance with human rights norms:

> Unocal supports the principles and aspirations of the Universal Declaration of Human Rights. We also recognize certain universally relevant workplace principles: freedom from discrimination in employment, elimination of child labor, freedom from forced labor and freedom of association and collective bargaining. . . Unocal believes that we have a responsibility to society, especially in relation to the impact of our operations. . . Managers are responsible for ensuring that any security arrangements developed for a Unocal-operated location consider the US/UK Voluntary Principles on Security and Human Rights.[29]

As noted in the quote, Unocal, like ExxonMobil, is a

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[27] *Id.* at 1.

[28] *See* note 21, *supra*.

[29] *See* http://www.unocal.com/ucl_code_of_conduct/index.htm at 1.

member of the U.S. government's *Voluntary Principles on Security and Human Rights* initiative.[30] Unocal also references one of the most significant and comprehensive corporate social responsibility programs, the UN Global Compact. This program, initiated by the United Nations, establishes Nine Principles that participating companies must implement.[31] Principle One is that "businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence."[32] The rationale for this commitment by participating companies is: "***[a] growing moral imperative to behave responsibly is allied to the recognition that a good human rights record can support improved business performance.***"[33]

Unocal not only accepts that compliance with human rights is good for business, it specifically disavows the competitive disadvantage argument of the NFTC Brief: "basic human values and high standards of ethical conduct have always been a central part of Unocal's approach to business and ***critical to our company's success.***"[34]

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[30] *See* note 26, *supra* and the accompanying text.

[31] *See generally*, http://www.unglobalcompact.org.

[32] *Id.* at 1.

[33] *Id.* at 1 (emphasis added).

[34] *See* http://www.unocal.com/responsibility/humanrights/hr1.htm (emphasis added)

C. The Coca-Cola Company

Coca-Cola is also heavily represented in the NFTC Brief by its membership in USA Engage, US Council for International Business, US-ASEAN Business Council, the Business Roundtable, and it is on the Board of Directors of the U.S. Chamber of Commerce.[35] Coca-Cola, as is typical of many international companies, has a code of conduct that includes specific requirements for compliance with health and safety regulations, respect for the right of employees to form unions and bargain collectively, and that prohibits the use of forced labor or child labor.[36] These specific and detailed provisions far exceed the limited scope of the ATCA's "law of nations," as applied by the federal courts. Coca-Cola requires its suppliers to comply with the code requirements because "good corporate citizenship is essential to our long-term business success and must be reflected in our relationships and actions in the marketplace, the workplace, the environment and the community."[37]

This sampling of three major U.S. companies is representative of the individual corporations that are members of the various Business *Amici*. Virtually all of the hundreds of companies that make up the Business *Amici* publically extol their commitment to human rights in their global operations.

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[35] *See* http://www.uschamber.com/about/board/all.htm, listing the Chamber's Board of Directors. For membership in the other bodies listed, see note 21, *supra*.

[36] Coca-Cola's Code of Business Conduct *at* http://www2.coca-cola.com/ourcompany/pdf/business_conduct_codes.pdf

[37] *Id.*

See generally, Prakash Sethi, *Setting Global Standards: Guidelines for Creating Codes of Conduct for Multinational Corporations* (New York: John Wiley and Sons, Inc., 2003)(noting the economic incentive for companies to market themselves as socially responsible, but criticizing the practice of some multinationals of failing take their public commitments seriously). The expansion and vitality of these programs is a thriving rebuttal to the notion that U.S. companies must be freed from the "burden" of observing the universal human rights standards enforceable through the ATCA. Through the work of CSR *Amici,* companies in today's market understand that they are rewarded for being socially responsible. That explains why the corporate members of the Business *Amici* are not waging a public campaign in their own names against the ATCA. It does not explain how any company that makes a good faith public commitment to respect human rights can assert even indirectly that the ATCA's very limited application to extreme forms of human rights violations will subject them to any economic impact.

It bears noting that some of these apparently conflicted corporations will undoubtably take their public commitments to a broad range of human rights more seriously if the ATCA remains a viable check to ensure that extreme violations of human rights are actionable in federal court. *See supra*, Harold Koh, 100 Yale L.J. at 2397-98 (noting that the possibility of ATCA suit serves as a significant deterrent to human rights violations).

CONCLUSION

The Court should disregard the arguments made by the Business *Amici*. There is no issue of economic impact properly before this Court. Moreover, the Business *Amici* have failed to

make the case that economic impact has any bearing on the application of the ATCA to fundamental human rights violations. More important, the legacy of Nuremberg and U.S. leadership on using the rule of law to address barbaric behavior cannot be sacrificed to the untenable position that the ATCA's application to such extreme human rights violations as slavery and torture places U.S. companies at a competitive disadvantage.

Respectfully submitted.

TERRENCE P. COLLINGSWORTH
(*Counsel of Record*)
NATACHA THYS
INTERNATIONAL LABOR RIGHTS FUND
733 15TH Street N.W., Suite 920
Washington, D.C. 20005
(202) 347-4100
Attorneys for Amici Curiae